Supreme Court, U.S.
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No. 86-882 (4)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z.; individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation, MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

v.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

STATEMENT OF APPELLEES IN HARTIGAN v. ZBARAZ No. 85-673, IN SUPPORT OF PETITIONERS' MOTION IN HODGSON v. MINNESOTA, NO. 86-882, TO GRANT CERTIORARI IN THAT CASE AND TO ARGUE HODGSON IN TANDEM WITH HARTIGAN.

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STATEMENT OF APPELLEES IN HARTIGAN v. ZBARAZ, No. 85-673, IN SUPPORT OF PETITIONERS' MOTION IN HODGSON v. MINNESOTA, No. 86-882 TO GRANT CERTIORARI IN THAT CASE AND TO ARGUE HODGSON IN TANDEM WITH HARTIGAN.

Plaintiffs-appellees in Hartigan v. Zbaraz, No. 85-673, respectfully urge this Court to grant certiorari to review the district court's decision in Hodgson v. Minnesota, No. 86-882, and further urge the Court to expedite review of Hodgson so that argument of Zbaraz and Hodgson may be heard in tandem. None of the parties in Zbaraz will suffer any prejudice by the minimal delays anticipated should the motion of the Hodgson petitioners be granted. Moreover, consolidated review would enhance the presentation of the important constitutional issues presented in both cases.

In further support of the Hodgson motion for expedited and joint consideration, plaintiffs-appellees in Zbaraz state the following:

1. While reserving the issue of its jurisdiction to hear the appeal brought by the State of Illinois from the decision of the United States Court of Appeals for the Seventh Circuit striking down part of the Illinios Parental Notice of Abortion Act of 1983, this Court announced on October 14, 1986 that it would review the following question presented by Mr. Hartigan in the State's jurisdictional statement in Hartigan v. Zbaraz, No. 85-673:

> Whether Illinois may constitutionally impose a waiting period, applicable only to minors and incompetents, after parental notification but before an abortion is performed, where it also provides a judicial alternative to notification.

2. The constitutionality of the mandatory waiting period provision now before this Court for review in Zbaraz is but one part of the comprehensive Illinois Parental Notice of Abortion Act of 1983.

a. The Illinois General Assembly enacted the Parental Notice of Abortion Act less than five months after this Court's decision in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), striking down a mandatory 24 hour waiting period imposed upon all women, adults and minors, seeking an abortion. Relying upon Akron and the affidavits submitted by plaintiffs, the district court granted plaintiffs' motion for summary judgment and declared unconstitutional the mandatory 24 hour waiting period imposed by the Act. The district court also found inadequate the Act's judicial by-pass procedures. No provisions in the Act assured either that the minor's identity would remain anonymous during all phases of the judicial procedure or that any appellate review of her judicial petition would be considered in an expeditious manner, the requisite elements of a by-pass system insisted upon by this Court's decisions in Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983), and Bellotti v. Baird, 443 U.S. 622 (1979). Finding the unconstitutional provisions inseparable from the remaining portions of the Act, the district court permanently enjoined the entire Act. At the time the district court issued its permanent injunction, the Illinois Act had never been implemented or enforced.

b. On appeal, the Seventh Circuit in Zbaraz also found the mandatory waiting period unconstitutional. While agreeing with the district court that the by-pass procedures were inadequate, the Seventh

Circuit declined to issue a final order declaring that section of the Act unconstitutional. Instead, that court continued the injunction but deferred a decision as to the constitutionality of the by-pass procedure until such time, if ever, that the Illinois Supreme Court promulgates the necessary rules for the appellate phases of the by-pass procedure. Although section 5(g) of the Act specifically requested the Illinois Supreme Court to promulgate the requisite rules, the Illinois court had not yet acted at the time of the Seventh Circuit's decision, nor has it acted to this date.

c. Although the constitutionality of the mandatory Illinois waiting period may be reviewed, this Court declined to review that part of the Seventh Circuit's decision continuing the injunction of the entire Act, until such time that the Illinois Supreme Court promulgates constitutionally appropriate rules for the judicial by-pass system. (See Jurisdictional Statement at pp. i, 21-24; Supreme Court order of October 14, 1986, 55 U.S.L.W. at 3247, 3257.) Thus Zbaraz presents for review only a narrow part of an all-inclusive parental notification statute.

3. The Minnesota parental notice statute at issue in Hodgson, like the Illinois Act, is a comprehensive statute mandating a waiting period after both parents of a minor receive notice of her intent to terminate an unwanted pregnancy. Unlike the Illinois Act, however, the Minnesota statute has a fully operative judicial by-pass system that has been in effect for five years. Thus, Hodgson in contrast to Zbaraz, presents to this Court for review a full statutory scheme regulating minors who seek abortions.

4. Moreover, because Hodgson is a challenge to the Minnesota statute as applied, the facts in Hodgson have been fully developed and analyzed by the lower court. The district court in Hodgson concluded that the Minnesota statute, including the mandatory waiting period, was unconstitutional after it reviewed the actual impact that the statute had had, after five years of operation, upon pregnant minors seeking to exercise their fundamental right to choose to have an abortion. The Hodgson court heard the testimony of more than 60 witnesses, including medical and psychological experts, and nearly every judge, public defender, guardian ad litem, nurse, counselor, and physician having experience with the operation and impact of the Minnesota law. (See generally Hodgson v. Humphrey, No. 86-882, Petition for Certiorari.) Hodgson thus presents this Court with a complete record that evaluates the consequences of a parental notice statute on a minor's ability to exercise her constitutional right to choose an abortion, including: the nature and duration of any delays actually occasioned by such a notification process, the medical complications caused by such a delay, and the deleterious effect of the judical by-pass itself on young women who choose that route, such as further delay of the abortion, and the health impact upon and and increased birth rate among those mature minors who the district found were unable to successfully invoke the waiver process. (Hodgson, App. at 58a.)

5. Such a factual record is preferable when determining important constitutional issues of great public concern. See e.g., Socialist Party v. Gilligan, 406 U.S. 583 (1972).

6. Zbaraz, in contrast with Hodgson, presents this Court with a facial challenge to a statute which had not gone into effect, based on limited factual evidence. However, simultaneous review of the decision in Hodgson would facilitate a thorough review of the Zbaraz case. For example, the Hodgson court's finding that the Minnesota parental notice statute, with all its delays and medical consequences does not "in any meaningful way further the State's interest in protecting minors," (Hodgson app. at 108a-109a) will help evaluate whether the Illinois statute furthers, in any way, the Illinois General Assembly's stated purpose of "protecting minors." Likewise, the Hodgson court's finding that state-mandated, involuntary communication between pregnant young women and their parents has an almost "universally negative" effect on family relations and the well-being of the pregnant minor (Hodgson app. at 78a) is of particular importance to the Zbaraz case, given the Illinois General Assembly's purported legislative purpose of "fostering the family structure and preserving it as a viable social unit." Ill. Rev. Stat. ch. 38, par. 81-62.

7. In the past, tandem consideration of similar, but not identical, abortion statutes has helped illuminate the constitutional parameters of the important fundamental right of privacy. See Roe v. Wade, 410 U.S. 113 (1973) (Texas abortion statute prohibited all abortions save those necessary to save the woman's life), considered in tandem with Doe v. Bolton, 410 U.S. 179 (1973) (Georgia abortion statute prohibited all abortions except when: the woman's life or health would be endangered by continuing the pregancy, the fetus would likely be born with a serious anomoly, or the pregnancy resulted from

rape); see Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (Missouri statute required all minors to secure parental consent before proceeding with an abortion) considered in tandem with Bellotti v. Baird, 428 U.S. 132 (1976) (Massachusetts statute required a minor to secure the consent of both parents before obtaining an abortion); see Beal v. Doe, 432 U.S. 438 (1977) (Pennsylvania medicaid regulations provided financial assistance only for therapeutic abortions) considered in tandem with Maher v. Roe, 432 U.S. 464 (1977) (Connecticut Welfare Department limits state medical benefits for first trimester abortions to only those that are medically necessary), and with Poelker v. Doe, 432 U.S. 519 (1977) (Publiclly-financed City hospital refused to provide hospital services for indigent women desiring elective, as opposed to therapeutic, abortions); see Harris v. McRae, 448 U.S. 297 (1980) (Hyde Amendment to Title XIX of Social Security Act denied public funding for certain medically necessary abortions) considered in tandem with Williams v. Zbaraz, 448 U.S. 358 (1980) (Illinois statute prohibits state medical assistance benefits payment for all abortions except those "necessary for the preservation of the life of the woman" seek such treatment); see City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (Akron ordinance required all second trimester abortions to be performed in hospitals, imposed a mandatory waiting period, and required parental consent for all minors 15 and younger seeking an abortion) considered in tandem with Planned Parenthood Assn. of Kansas City, Inc. v. Ashcroft, 462 U.S. 476 (1983) (Missouri law required all second trimester abortions to be performed in hospitals and required minors to

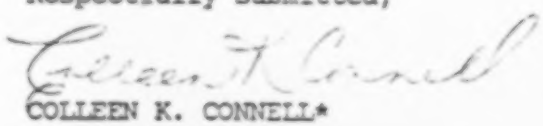
secure parental consent or to pursue the judicial alternative to parental consent); and see Diamond v. Charles, 106 S.Ct. 1697 (1986) (Illinois law governing post-viability abortions required physicians to use method of abortion most favorable to fetus) considered in tandem with Thornburgh v. American College of Obstetricians & Gynecologists, 106 S.Ct. 2169 (1986) (Pennsylvania law required physicians performing post-viability abortions to use method most protective of fetus unless such method imposed a "significantly greater" risk upon the woman).

8. Any delay caused by considering Hodgson in tandem with Zbaraz will not cause any prejudice to the parties in Zbaraz. Indeed, the Illinois Attorney General, appellant in Zbaraz, has requested and received an extension of time in which to submit its brief. (See letter of Roma J. Stewart, Illinois Solicitor General to Supreme Court Clerk, dated November 12, 1986). Appellant Hartigan also sought and received a similar extension of time in which to docket this case in this Court. (Application of Neil F. Hartigan For Extension of Time To Docket case, dated August 9, 1985.) Moreover, any delay in this Court's decision occasioned by granting the Hodgson motion will not prejudice the parties because the Illinois Act will not go into effect until such time as the Illinois Supreme Court promulgates the necessary by-pass rules. Finally, when issues of imperative public importance are presented, the interests of the public are best served by presentation of the constitutional issues upon a fully developed factual record.

Wherefore, for the reasons set forth above, plaintiffs-appellees in Hartigan v. Zbaraz, No. 85-673, respectfully request that this Court grant the petition for certiorari filed in Hodgson v. Humphrey, No. 86-

882, and expedite that case so that it may be reviewed in tandem with Zbaraz. Plaintiffs-appellees in Zbaraz further request that briefing in Zbaraz be stayed until such time as the Hodgson motions are decided.

Respectfully submitted,



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